6352

Nos. 06-84 & 06-100

FILED
NOV 13 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

SAFECO INSURANCE COMPANY OF AMERICA, *et al.*,

Petitioners,

v.

CHARLES BURR, *et al.*,

Respondents.

GEICO GENERAL INSURANCE COMPANY, *et al.*,

Petitioners,

v.

AJENE EDO,

Respondent.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR *AMICUS CURIAE* NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE[1]

Amicus curiae the National Association of Mutual Insurance Companies (NAMIC) is a national trade association representing companies writing property and casualty insurance in every state and jurisdiction of the United States. NAMIC has more than 1,400 member companies that underwrite 43 percent ($196 billion) of the property/casualty insurance premiums in the United States. NAMIC members account for 44 percent of the homeowners market, 38 percent of the automobile market, 39 percent of the workers' compensation market, and 31 percent of the commercial property and liability market. NAMIC benefits member companies through advocacy, public policy and member services. NAMIC regularly appears in judicial proceedings as an amicus to inform courts about the implication of legal developments for their members.

The issues of the interpretation and application of the Fair Credit Reporting Act (FCRA) that are before the Court in the present consolidated cases are of great importance to NAMIC's members. The Ninth Circuit's decision threatens insurance companies and other users of credit information with crushing liability that NAMIC believes is contrary to the statutory language and to Congress' intent in enacting the FCRA.

SUMMARY OF ARGUMENT

The Ninth Circuit's interpretation of key statutory provisions of the FCRA drastically expands the obligations and potential liability of insurance companies and other users of credit information under the FCRA. Under the FCRA, it is a permissible practice for insurance companies to consider

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[1] Pursuant to Supreme Court Rule 37.6, amicus curiae NAMIC states that no counsel for any party to this dispute authored this brief in whole or in part and no person or entity, other than amicus curiae and their counsel, made a monetary contribution to the preparation or submission of this brief. All parties have given blanket consent to the filing of all amicus briefs in this case, in letters of consent filed with the Clerk of this Court.

a consumer's credit history or other consumer information in making underwriting decisions as to whether to insure a particular risk and at what price. *See* 15 U.S.C. § 1681b(a)(3)(C). However, in certain circumstances described by the statute, an insurer is obliged to notify the consumer when it has taken an adverse action based on the consumer's credit report. The Petitioners in the FCRA class actions now before this Court are alleged to have willfully failed to comply with the statutory adverse action notice requirement. The Ninth Circuit's decision presents critical questions of statutory interpretation regarding the definition of "adverse action" in section 1681a(k)(1)(B)(i) of the Act and the meaning of "willful" noncompliance under section 1681n(a). This *amicus* brief addresses both of these issues.

The FCRA includes a number of civil penalty provisions to penalize violations of or noncompliance with the requirements of the Act. The FCRA establishes different civil penalties for "negligent," "knowing," and "willful" violations, with the most severe civil penalties, reserved for "willful" violations. 15 U.S.C. § 1681n(a). Plaintiffs who establish a willful violation need not show actual damages, but may recover statutory damages of up to $1000 per plaintiff, as well as punitive damages and attorneys' fees. *Id.*

In the decision under review, the Ninth Circuit erroneously held that "willful" noncompliance with the requirements of the Act encompasses not only a knowing and intentional failure to comply, but also "reckless disregard." *Reynolds v. Hartford Fin. Servs. Group, Inc.*, 435 F.3d 1081, 1099 (9th Cir. 2006), *cert. granted*, 75 U.S.L.W. 3162 (U.S. Sept. 26, 2006) (No. 06-100). The Ninth Circuit's expansive interpretation of the statutory term "willfully" places an excessive and potentially crushing burden of liability on users and providers of credit information, facilitating and encouraging huge nationwide class actions seeking statutory and punitive damages on behalf of persons who have not suffered any actual damages from the instances of noncompliance they allege.[2]

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[2] For a discussion of the potential for "catastrophic" and "disproportionate" damages in class actions for statutory and punitive

The Ninth Circuit's primary rationale for this ruling was its belief that this Court's decisions on the meaning of "willfulness" in various other statutory contexts establish a rule that the word "willful" when used in civil statutes means reckless, while in criminal statutes the meaning is limited to knowing, intentional conduct. *Id.* at 1098. The existence of such a rule, however, is negated by this Court's decision in *Kawaauhau v. Geiger*, 523 U.S. 57, 61 (1998), in which the Court held that "willful" as used in section 523(a)(6) of the Bankruptcy Code did not include the meaning "reckless," noting that if Congress had intended that meaning, it could have added the word "reckless" to the statute.

Moreover, this Court has repeatedly emphasized that the word "willful" as used in civil and criminal statutes is "'a word of many meanings' whose construction is often dependent on the context in which it appears." *Bryan v. United States*, 524 U.S. 184, 191 (1998) (citation omitted); *see also Ratzlaf v. United States*, 510 U.S. 135, 141 (1994) (same). Thus, the Court has indicated that the meaning of the term "willful," whether in civil or criminal statutes, must be determined through a careful analysis of the statutory language, context and purposes. Such an analysis – which the Ninth Circuit failed to perform – demonstrates that the term "willful" as used in the FCRA was intended to encompass only intentional conduct committed with knowledge that the conduct was contrary to the requirements of the Act.

In particular, in the hierarchy of violations and civil penalties created by the FCRA (willful noncompliance, knowing noncompliance, and negligent noncompliance), only willful noncompliance carries the possibility of punitive damages. By holding that willful noncompliance does not require a showing that a defendant acted with knowledge that its conduct was unlawful, but is satisfied by a showing that the defendant acted in "reckless disregard" of the statutory requirements, the Ninth Circuit erroneously has subjected less culpable conduct to the penalties that Congress intended

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damages under section 1681n(a), *see In re Trans Union Corp. Privacy Litigation*, 211 F.R.D. 328, 348-51 (N.D. Ill. 2002).

be reserved for only the most culpable violations of the FCRA.

The Ninth Circuit's incorrect interpretation of "willful" improperly creates a dramatic expansion of liability for statutory and punitive damages under the FCRA that is inconsistent with the purposes of the statute. The FCRA was enacted to regulate and to spur the development of consumer credit markets and the use of credit information -- economic activity that Congress recognized was vital to the national economy and beneficial to both consumers and businesses. The FCRA was also intended to protect consumers by defining the permissible purposes for which a consumer's credit information may be accessed without his or her permission and by establishing procedures to ensure that credit information is accurately reported. The expansion of liability created by the Ninth Circuit's decision impairs the balance struck by Congress as best furthering these statutory purposes.

The Ninth Circuit's interpretation and application of the FCRA's definition of "adverse action" also directly contravenes the plain language of the statute. The relevant portion of the statutory definition of "adverse action" limits the FCRA's notice requirements to "an increase in any charge for . . . any insurance, existing or applied for, in connection with the underwriting of insurance." 15 U.S.C. § 1681a(k)(1)(B)(i). Under the Ninth Circuit's broad interpretation, an increase occurs whenever a consumer pays a higher rate because his credit rating is less than the top potential score – even if the consumer in fact obtains insurance rates that are more favorable than those he would have had if his credit information had not been used and even if the consumer is provided insurance at the rate previously quoted to him or her without use of any credit information.

The Ninth Circuit's "top potential score" benchmark for determining whether there has been an increase in the charge for insurance is found nowhere in the language of the FCRA. If sustained, this new definition would require adverse action notices to nearly all purchasers of insurance. The district court's common sense holding that an "increase in any

charge" for insurance cannot occur "unless the insurer makes an initial demand for payment to the insured and subsequently increases the amount of that demand based on information in the insured's credit report"[3] accords with the language of the statute and provides a bright line rule. Alternatively, the procedure adopted by GEICO, under which adverse action notices are provided only to those purchasers who were charged a higher rate than would have been charged had their credit information been neutral, complies with the letter and purposes of the statute.

For these reasons and those set forth below, NAMIC respectfully submits that the Ninth Circuit's decisions in the cases at bar should be reversed.

I. THE NINTH CIRCUIT'S WILLFULNESS STANDARD IS CONTRARY TO THE FCRA'S STATUTORY LANGUAGE AND PURPOSE

A. The Ninth Circuit Erred in Its Interpretation of the Statutory Term "Willful"

The statutory language and context of section 1681a of the FCRA, considered in light of the principles of statutory interpretation established by this Court, require that "willful" noncompliance be interpreted to mean a knowing and intentional failure to comply with the statute. The Ninth Circuit's ruling that "willfulness" encompasses not only knowing and intentional noncompliance with the statute, but also "reckless disregard" of the statute's requirements, *see Reynolds*, 435 F.3d at 1098-99, is incompatible with the statutory language and context, creating enormous, unintended liability for insurance companies and others subject to the FCRA.

The Ninth Circuit's holding that a willful failure to comply encompasses reckless disregard is based upon the incorrect

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[3] *Rausch v. Hartford Fin. Servs. Group, Inc.*, No. CV 01-1529-BR, 2003 WL 22722061, at *2 (D. Or. July 31, 2003), *rev'd sub nom. Reynolds v. Hartford Fin. Servs. Group, Inc.*, 416 F.3d 1097 (9th Cir. 2005), *superseded by* 435 F.3d 1081 (9th Cir. 2006).

contention that this Court's precedents establish the rule that the word "willful" as used in civil statutes includes the meaning "reckless," while in criminal statutes the meaning of the word "willful" is limited to intentional conduct that the defendant knows to be unlawful. *See id.* at 1098. This Court has established no such rule. Indeed, *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985), and the other cases cited by the Ninth Circuit, do not support the criminal/civil distinction drawn by the Ninth Circuit. In *Thurston*, far from adopting such a distinction, this Court's analysis of the meaning of the word "willful" under the Age Discrimination in Employment Act looked to prior decisions construing both civil and criminal statutes. *See id.* at 126-27.

Moreover, this Court has not uniformly construed "willful" in civil statutes to include reckless disregard. In *Kawaauhau v. Geiger*, 523 U.S. 57 (1998), for example, this Court expressly rejected that interpretation in construing the word "willful" in section 523(a)(6) of the Bankruptcy Code, a civil provision, which creates an exception from bankruptcy discharge for debts "for willful and malicious injury by the debtor to another." 11 U.S.C. § 523(a)(6). This Court held that the word "willful" indicated "a deliberate or intentional injury." 523 U.S. at 61. In *Kawaauhau*, the Court noted that if Congress had intended a broader meaning, it "might have selected an additional word or words, *i.e.*, 'reckless' . . . to modify 'injury.'" *Id.* The Court also stressed that the "more encompassing interpretation" urged by the plaintiffs in that case would improperly except a wide range of debts from discharge (*id.* at 58) – a result long held to be contrary to the purposes of the bankruptcy statutes.

This Court has repeatedly emphasized that the word "willful" as used in statutes is "'a word of many meanings' whose construction is often dependent on the context in which it appears." *Bryan v. United States*, 524 U.S. 184, 191 (1998) (citation omitted); *see also Ratzlaf v. United States*, 510 U.S. 135, 141 (1994) (same). Accordingly, in determining the meaning of the word "willful" in both criminal and civil statutes, this Court has looked to principles of statutory construction that require a careful analysis of the language, context and purposes of the statute in question.

In construing the word "willful," this Court has examined both the immediate context in which the word is used and "the complex of provisions in which [it is] embedded." *Ratzlaf*, 510 U.S. at 141. In particular, in determining the meaning of the word "willful," this Court has looked to the word or words that "willful" modifies. *See, e.g., Kawaauhau*, 523 U.S. at 61 ("The word 'willful' in [11 U.S.C. § 523](a)(6) modifies the word 'injury,' indicating that nondischargeability takes a deliberate or intentional *injury*, not merely a deliberate or intentional *act* that leads to injury."). Moreover, in conformity with the rule of statutory interpretation that a "term appearing in several places in a statutory text is generally read the same way each time it appears," this Court has recognized that the word "willful" should not be construed so malleably as to have an individuated interpretation each place it appears or with regard to the different terms, phrases or statutory sections to which it refers. *Ratzlaf*, 510 U.S. at 143.

An analysis of the statutory language following these principles of statutory interpretation demonstrates that "reckless" is not within the possible range of meanings of the word "willful" as used in subsection 1681n(a) of the FCRA. In particular, an analysis of this subsection shows how the context in which the word "willful" is found limits its meaning. Subsection (a) specifies both the damages available generally for willful noncompliance with the requirements of the statute and the damages available specifically for willfully obtaining a consumer report under false pretenses or knowingly without a permissible purpose. *See* 15 U.S.C. § 1681n(a)(1)(A) & (B). Grammatically, subsection (a) consists of a single sentence, the first portion of which introduces and then is completed by a number of paragraphs and subparagraphs listing the available damages.[4]

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[4] Subsection (a) reads in its entirety as follows:

> **(a) In general**
>
> Any person who willfully fails to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer in an amount equal to the sum of—

The word "willfully" occurs in the introductory portion of subsection (a) ("Any person who *willfully* fails to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer in an amount equal to the sum of--"), and, consequently, all of the damages provisions listed in the following subparagraphs are contingent upon a willful failure to comply with the statute.

Thus, under the principles of statutory interpretation discussed above, the word "willfully" in section 1681n(a) must be given a meaning that is compatible with all of the subparagraphs to which it refers. The use of the word "willful" to modify conduct described in subparagraph (a)(1)(B), namely, "obtaining a consumer report under false pretenses or knowingly without a permissible purpose" is, however, clearly incompatible with the meaning of "reckless" attributed to it by the Ninth Circuit.

By its plain terms, a willful failure to comply with the statute as described in subsection (a)(1)(B) must be knowing and intentional, both in the case of willfully "obtaining a consumer report under false pretenses" and in the case of willfully "obtaining a consumer report . . . knowingly without a permissible purpose." First, the words "under false pretenses" clearly describe conduct that is knowingly and intentionally deceptive. *Cf. Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 197 (1976) (statutory language making unlawful the use or employment of "any manipulative or

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> **(1)(A)** any actual damages sustained by the consumer as a result of the failure or damages of not less than $100 and not more than $1,000; or
>
> **(B)** in the case of liability of a natural person for obtaining a consumer report under false pretenses or knowingly without a permissible purpose, actual damages sustained by the consumer as a result of the failure or $1,000, whichever is greater;
>
> **(2)** such amount of punitive damages as the court may allow; and
>
> **(3)** in the case of any successful action to enforce any liability under this section, the costs of the action together with reasonable attorney's fees as determined by the court.

15 U.S.C. § 1681n(a).

deceptive device or contrivance" strongly suggests that the statute "was intended to proscribe knowing or intentional conduct"). Likewise, the words "knowingly without a permissible purpose" expressly require that the defendant knows that he does not have a permissible purpose under the FCRA for obtaining the consumer report in question.[5] The concept of recklessness is inconsistent with the statutory language "obtaining a consumer report under false pretenses or knowingly without a permissible purpose." To be sure, the words "willful" and "willfully," when used to describe such conduct, must mean deliberate and intentional.

This Court's established principles of statutory interpretation require that "willful" in section 1681n(a) be given this same meaning in reference to other general acts of willful noncompliance to which subsection (a)(1)(A) is applicable. As noted above, when the word "willful" "appear[s] in several places in a statutory text," it is "generally read the same way each time it appears." *Ratzlaf*, 510 U.S. at 143 (citing *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 479 (1992)). Moreover, when, as here with the word "willful," a "*single* formulation" is "called into play" with regard to related provisions, there is "even stronger cause" to construe that formulation "the same way each time it is called into play." *Ratzlaf*, 510 U.S. at 143; *see also Clark v. Martinez*, 543 U.S. 371, 380 (2005) (statutory language given a limited construction in one context must be interpreted consistently in other contexts, even though other of the statute's applications, standing alone, would not support the same limitation).

Accordingly, the meaning of "willfully," as defined by its use as a modifier of the clauses "obtaining a consumer report under false pretenses or knowingly without a permissible purpose," applies also to its use to describe noncompliance in general with the statutory requirements. Because "willfully" means deliberately and intentionally with regard to

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[5] Section 1681b of the FCRA, 15 U.S.C. § 1681b, sets forth the permissible purposes for consumer reports.

subsection (a)(1)(B), it cannot mean "with reckless disregard" in reference to subparagraph (a)(1)(A).[6]

In addition, an interpretation of "willfully" as meaning deliberately and intentionally properly reflects and preserves the distinctions between the three different levels of civil penalties established under the FCRA. The FCRA defines and penalizes willful, knowing, and negligent noncompliance with the Act. *See* 15 U.S.C. § 1681n(a) (willful noncompliance); § 1681n(b) (knowing noncompliance); § 1681o (negligent noncompliance). Under the FCRA, willful noncompliance carries the most severe penalties. Willful noncompliance is subject not only to statutory penalties of up to $1000, but also to punitive damages. *See* 15 U.S.C. § 1681n(a)(1) & (2). Knowing noncompliance (which applies only to improperly obtaining consumer reports) is subject to a penalty of the greater of actual damages or $1000, 15 U.S.C. 1681n(b), while negligent noncompliance renders the defendant liable only for actual damages. These three levels of culpability and the hierarchy of penalties clearly recognize that willful noncompliance is deserving of greater condemnation and punishment than knowing noncompliance, and that knowing noncompliance is more serious than negligent noncompliance. The Ninth Circuit's expansion of "willful" noncompliance to include "reckless disregard" improperly subjects conduct of a lesser degree of culpability to the most severe penalties available under the statute. *Cf., e.g., Cocio v. Bramlett*, 872 F.2d 889, 892 (9th Cir. 1989) (the law recognizes that "[i]ntentional acts are more reprehensible than reckless acts. Reckless acts are more serious than negligent acts.") (citing *Solem v. Helm*, 463 U.S.

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[6] This construction of the word willful also accords with standard dictionary definitions. *See, e.g., Merriam Webster's Collegiate Dictionary* 1354 (10th ed. 1994) (defining willful as "obstinately and often perversely self-willed" or "done deliberately: INTENTIONAL"). "Recklessness" is closer to gross negligence. Indeed, as a leading authority on the law of torts has written, there "is no clear distinction at all between ['recklessness'] and 'gross' negligence, and the two have tended to merge and take on the same meaning, of an aggravated form of negligence . . . " William L. Prosser, *The Law of Torts* 185 (4th ed. 1971), *as quoted in Smith v. Wade*, 461 U.S. 30, 73 (1983) (Rehnquist, J., dissenting).

277, 293 (1983)). Construing "willfully" to require deliberate noncompliance with known legal requirements accords with Congress' evident intent to make "willful noncompliance" the most serious, and severely punishable, level of noncompliance with the statute.

Subsection 1681n(b), headed "Civil liability for knowing noncompliance," also provides civil penalties for "obtaining a consumer report from a consumer reporting agency under false pretenses or knowingly without a permissible purpose," but does not require that the violation be "willful." 15 U.S.C. § 1681n(b). Significantly, there are no punitive damages for non-willfully obtaining a consumer report. Again, it is evident from the statutory scheme that "willfully" obtaining a consumer report under false pretenses or knowingly without a permissible purpose requires a greater level of culpability than committing the same violation without willfulness. The word "willfully" thus requires more than "false pretenses" and knowledge of unlawfulness, not the lesser degree of culpability embodied in the Ninth Circuit's "reckless disregard" standard.[7]

The FCRA's criminal penalty provision, section 1681q, also bolsters the conclusion that "willful" does not mean "reckless" for purposes of section 1681n. Section 1681q provides criminal penalties for "knowingly *and* willfully obtain[ing] information on a consumer from a consumer reporting agency under false pretenses." 15 U.S.C. § 1681q (emphasis added). As in section 1681n, in this context too, the word "willfully" creates a standard of culpability that requires more than mere "knowing," not less. If the Ninth Circuit's interpretation of the word "willfully" were accepted, the phrase "knowingly and willfully" would have the contradictory meaning of "knowingly and at the same time

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[7] An analogous example of Congress' understanding of the terms willfully and knowingly is provided by its amendment of the Endangered Species Act. *See* Endangered Species Act Amendments of 1978, H.R. Conf. Rep. No. 95-1804, at 26 (1978), *reprinted in* 1978 U.S.C.C.A.N. 9484, 9493 (amending penalty provisions of Endangered Species Act to "*reduce*[]" the standard from "willfully" to "knowingly" to facilitate enforcement by eliminating knowledge of the law (required for willfulness) as an element of a violation) (emphasis added).

not knowingly, but recklessly." Clearly, reckless disregard is incompatible with the use of the word "willfully" in section 1681q, where its context again shows it to mean "deliberately and intentionally." Under the rule of statutory construction that a "term appearing in several places in a statutory text is generally read the same way each time it appears," *Ratzlaf*, 510 U.S. at 143, the word "willfully" should be given the same meaning in section 1681n that it has in section 1681q. Thus, section 1681q further confirms that, contrary to the Ninth Circuit's holding, "willful noncompliance" in section 1681n(a) does not refer to an intermediate level of culpability between negligence and knowing, but creates a higher standard for liability that requires an intentional and deliberate failure to comply with the requirements of the FCRA.

In sum, examination of the language and context of section 1681n(a) and of the "complex of provisions in which [it is] embedded," *Ratzlaf*, 510 U.S. at 141, demonstrates that there can be liability for "willful" noncompliance with the requirements of the FCRA only if it is shown that the defendant knew that its conduct was unlawful and deliberately and intentionally violated the statute. As shown below, that conclusion is supported also by an analysis of the purposes and objectives of the FCRA.

B. The Purposes and Enforcement Needs of the FCRA Are Not Served by the Expanded Liability Created by the Ninth Circuit's Reckless Disregard Standard

In addressing the meaning of the word "willful," this Court has considered the purposes of both the particular statutory provision and the larger statutory scheme of which it is a part, the nature of the conduct regulated or prohibited by the statute, and the scope of enforcement and deterrence needed to effectuate the statutory goals. Despite lip service to the need for a "fair and balanced" approach that purportedly "best furthers the purposes and objectives of the Act," *Reynolds*, 435 F.3d at 1099, the Ninth Circuit's opinion is lopsided, elevating enforcement and deterrence over other statutory purposes.

In enacting and amending the FCRA, Congress sought to regulate an aspect of economic activity -- the use and distribution of credit information -- that it recognized was a vital and necessary part of a healthy, functioning economy. In seeking to ensure the accuracy of credit information, Congress acted not only to protect consumers, but to advance the needs of the nation's economic system.[8] The Ninth Circuit's expansive interpretation of the statutory term "willful" upsets the balance struck by Congress and places an excessive and potentially crushing burden of liability on users and providers of credit information, facilitating and encouraging huge nationwide class actions seeking statutory and punitive damages. Under the Ninth Circuit's erroneous "recklessness" standard, this massive litigation can be accomplished without the plaintiffs having to prove knowing and intentional wrongdoing on the part of the defendant, and without having to prove that they have suffered any actual harm at all from the instances of noncompliance they allege. This result is damaging to the nation's economic system and credit markets and is not compatible with the purposes of the FCRA.

Different interpretations of the word "willful" may be required to advance the purposes and enforcement of different statutes. For example, as noted above, section 523(a)(6) of the Bankruptcy Code, which excepts from discharge debts for "willful and malicious injury by the debtor to another . . . " applies only to "deliberate or intentional injury," not to recklessly caused injuries. *See Kawaauhau,* 523 U.S. at 61. A "more encompassing interpretation" would improperly except a wide range of debts from discharge (*id.* at 58) – a result long held to be contrary to the purposes of the bankruptcy statutes. Conversely, under 26 U.S.C. § 6651(a)(1), which establishes civil penalties for failure to file a tax return "unless it is

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[8] *See, e.g.*, Senate Report No. 108-166 (Oct. 17, 2003), *available at* 2003 WL 22399643, at *6-7 (achieving accuracy in consumer report information was a main goal of the FCRA because "inaccuracy retains the potential to be particularly unfair to any given consumer and to cause general inefficiencies in the operation of the credit markets;" the goals of 1996 FCRA amendments were to improve accuracy of credit information and "enhance the development of national credit markets").

shown that such failure is due to reasonable cause and not due to willful neglect," "willful neglect" is interpreted as including both "a conscious, intentional failure" and "reckless indifference." *United States v. Boyle*, 469 U.S. 241, 245 (1985). As this Court explained, the purposes and enforcement needs of the internal revenue system required that standard, given that "[t]he Government has millions of taxpayers to monitor, and our system of self-assessment in the initial calculation of a tax simply cannot work on any basis other than one of strict filing standards." *Id.* at 249.

In the case of criminal penalties for "willfully violating" statutory provisions prohibiting structuring currency transactions to evade reporting requirements, this Court has interpreted the word "willfully" to mean with knowledge that the structuring was unlawful. *Ratzlaf*, 510 U.S. at 146-47. Significantly, in *Ratzlaf*, the Court was "unpersuaded by the argument that structuring is so obviously 'evil' or inherently 'bad' that the 'willfulness' requirement is satisfied irrespective of the defendant's knowledge of the illegality of structuring." *Id.* at 146. Rather, the Court observed that in many instances an individual may permissibly structure a transaction so as to achieve a particular result under the applicable statutes. *Id.* at 145 ("Courts have noted 'many occasions' on which persons, without violating any law, may structure transactions 'in order to avoid the impact of some regulation or tax.'") (citations omitted). Accordingly, in that context, a willfulness standard requiring knowledge of illegality is necessary to protect individuals engaging in behavior they believe to be permissible. The Court also noted that if Congress had wished to impose liability "irrespective of the defendant's knowledge of the illegality of structuring," it "could have furnished the appropriate instruction." *Id.* at 147.

Likewise, the statutory purposes and the nature of the conduct prohibited appears to have been a significant factor in this Court's interpretation of the word "willful" in employment discrimination statutes. Those statutes were enacted "as part of an ongoing congressional effort to eradicate discrimination in the workplace" and "reflect[] a societal condemnation of invidious bias in employment decisions." *McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352, 357 (1995); *see also Kolstad v. Am. Dental Ass'n*,

527 U.S. 526, 550 (1999) (Stevens, J., concurring in part and dissenting in part, joined by JJ. Souter, Ginsburg, and Breyer) (rejecting statutory interpretation of punitive damages standard under Title VII and the ADA that would have limited punitive damages to "only those violations that are accompanied by particularly outlandish acts"). Where the conduct prohibited by a statute is condemned by society and threatens the fundamental rights of other persons, a defendant's reckless disregard of the statutory prohibition may qualify as "willful," and the resulting heightened level of deterrence and enforcement furthers the statutory objectives.

In contrast, the FCRA regulates economic and financial practices. While the FCRA seeks to protect individual consumers from potential injury caused by inaccuracies in their credit reports, it also recognizes the economic efficiencies and beneficial aspects of the "current system" of the use of credit information that "makes more credit available, to a greater range of consumers, on a more timely basis." S. Rep. No. 108-166, *available at* 2003 WL 22399643, at *4. This has been accomplished through advances in technology that have made credit information available on a very large scale, so that "a consumer's credit risk is carefully calculated so that he is offered a particular rate or terms that closely match the risks his report suggests he poses." *Id.* at *7; *see also id.* ("Because of the precision it affords creditors, risk-based pricing has made credit available to many more people."). Thus, Congress has recognized that "[o]verall, the use of risk-based pricing provides numerous benefits to the economy and consumers." *Id.* at *8. These benefits are presented in the use of credit information in insurance underwriting, as well. In short, the FCRA regulates beneficial economic activity in a "consumer reporting system" of "vast size and complexity" that "supports decision making with respect to trillions of dollars of consumer credit and insurance and millions of jobs." *Id.* at *6-7. Accordingly, the statutory purposes and enforcement needs of the FCRA are not comparable to those of the anti-discrimination statutes at issue in the cases upon which the Ninth Circuit relied. *See Reynolds*, 435 U.S. at 1098 (citing *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 128

(1985), and *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 614 (1993)).[9]

That Congress did not intend users and providers of credit information to be subject to the expanded liability engendered by the Ninth Circuit's decision is also confirmed by the fact that since the original enactment of section 1681n in 1970 the Courts of Appeals have consistently held that "willfulness" requires knowledge that the conduct is unlawful or a *conscious* disregard of the law. *See, e.g., Stevenson v. TRW Inc.*, 987 F.2d 288, 296 (5th Cir. 1993) (no willful noncompliance where defendant did not act "knowingly and intentionally" and "in conscious disregard of consumers' rights"); *Yohay v. City of Alexandria Employees Credit Union, Inc.*, 827 F.2d 967, 969-70, 972 (4th Cir. 1987) (willfulness requires that FCRA has been "violated 'voluntarily and intentionally'") (citation omitted); *Pinner v. Schmidt*, 805 F.2d 1258, 1263 (5th Cir. 1986) (reversing award of punitive damages under FCRA for lack of willfulness where there was "no evidence that [defendants] knowingly and intentionally committed an act in conscious disregard for the rights of others").[10] Significantly, after

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[9] This Court's analysis in *Thurston* also relied extensively on the legislative history of the ADEA, which strongly suggested that Congress intended the ADEA to apply to reckless conduct. *See* 469 U.S. at 127-29; *see also Hazen Paper Co. v. Biggins*, 507 U.S. 604, 614 (1993) (recognizing that the *Thurston* "reckless disregard" standard was grounded in the legislative history of the ADEA). There is no support in the legislative history of the FCRA for interpreting "willful" noncompliance under section 1681n(a) to include reckless disregard.

[10] *See also Phillips v. Grendahl*, 312 F.3d 357, 370 (8th Cir. 2002) ("[W]illful noncompliance under section 1681n requires knowing and intentional commission of an act the defendant knows to violate the law"); *Duncan v. Handmaker*, 149 F.3d 424, 429 (6th Cir. 1998) (an actual belief of legality suffices to defeat willfulness liability under the FCRA); *Casella v. Equifax Credit Info. Servs.*, 56 F.3d 469, 476 (2d Cir. 1995) (holding that defendant's "course of conduct d[id] not support the kind of 'conscious disregard' or 'deliberate and purposeful' actions necessary to make out a claim for willful noncompliance under the FCRA"); *Dalton v. Capital Associated Indus. Inc.*, 257 F.3d 409, 418 (4th Cir. 2001) ("willfulness" under the FCRA requires that the defendant "'knowingly and intentionally committed an act in conscious disregard for the rights'"

these decisions, when section 1681n was amended in 1996, Congress made no change to the standard for willful violations of the Act.[11] Presumably, had Congress intended willfulness to include reckless disregard, it could have amended the statute to add the word "recklessly."

In appropriate statutory contexts, "willfulness" may be interpreted to include recklessness – particularly where the conduct in question involves a serious risk of impairing fundamental rights or causing physical injury. Such an interpretation is inappropriate, however, in other contexts such as the FCRA. This distinction accords with common-sense observation as to how the word "willful" is used in ordinary language. It also is consistent with basic common law principles relevant to the issue of when reckless conduct is sufficient to merit punitive damages. Typically, punitive damages are deemed appropriate for reckless conduct only if the conduct causes physical injury or results in a deprivation of a fundamental constitutional right.[12] Conduct that causes or threatens only economic harm generally must be intentional to merit punitive damages. *See, e.g., State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 419 (2003) (differentiating between economic and physical harm; listing "reckless disregard of the health or safety of others" as factor in punitive damages analysis); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 576 (1996) (noting absence of "reckless disregard for the health and safety of others;" stating that "infliction of economic injury, especially when done *intentionally* through affirmative acts of misconduct" can

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of the consumer) (citation omitted); *Wantz v. Experian Info. Solutions*, 386 F.3d 829, 834 (7th Cir. 2004) ("To act willfully, a defendant must knowingly and intentionally violate the Act, and it 'must also be conscious that [its] act impinges on the rights of others.'") (alteration in original; citation omitted).

[11] In contrast, under Title VII, Congress spelled out its intent that punitive damages may be awarded for intentional discrimination if it is demonstrated that the employer acted with "malice or with reckless indifference to the [plaintiff's] federally protected rights." 42 U.S.C. § 1981a(b)(1).

[12] *See, e.g., Casillas-Diaz v. Palau*, 463 F.3d 77, 84-85 (1st Cir. 2006). (punitive damages appropriate where defendants acted "with reckless disregard of plaintiffs' constitutional rights").

warrant punitive damages) (emphasis added; citation omitted).

In concluding that a "reckless disregard" standard would be "fair and balanced" and would "best further the purposes and objectives of the Act," the Ninth Circuit improperly emphasized what it viewed as the need to ensure that section 1681n "d[id] not create perverse incentives for companies covered by FCRA to avoid learning the law's dictates by employing counsel with the deliberate purpose of obtaining opinions that provide creative but unlikely answers to 'issues of first impression'" and to distinguish between such companies and companies who might "come to a tenable, albeit erroneous, interpretation of the statute." *Reynolds*, 435 F.3d at 1099; *see also id.* ("reliance on creative lawyering that provides indefensible answers will [not] ordinarily be sufficient to avoid a conclusion that a company acted with willful disregard of FCRA's requirement"). Based upon such considerations, the Ninth Circuit in *Reynolds* reversed the grant of summary judgment in favor of the defendants on the issue of willfulness, ruling that "at least some" of the defendant insurance companies' interpretations of the FCRA were "implausible" or "frivolous." *Id.* at 1095, 1099. The Ninth Circuit's precepts as to the application of its willfulness/recklessness standard and its concerns that companies and attorneys will abuse situations in which they are faced with a question of "first impression" have no basis in the statutory language of the FCRA and its purposes and objectives, or for that matter, in the legislative history.

Under the Ninth Circuit's decision, factors that normally favor a finding of an absence of willfulness and/or recklessness as a matter of law are turned on their heads, all in service of a jaundiced and unsupported view of how businesses and companies formulate their conduct in regulatory and compliance contexts and how lawyers view their obligations to their clients and to the legal system. For example, the fact that an issue is one of first impression normally weighs toward excusing or mitigating a failure to understand a legal issue or comply with regulatory requirement. Thus, in *Stevenson*, 987 F.2d at 296, the Fifth Circuit reversed a finding of willful noncompliance and an award of punitive damages under the FCRA because "[t]here

was no prior guidance to suggest" that the defendant's conduct did not comply with the Act.[13] Likewise, the fact that a defendant has consulted counsel or that (as in the present cases) the trial court agreed with the defendants' interpretation of their legal obligations would generally negate willfulness even under a recklessness standard. *See, e.g., Thurston*, 469 U.S. at 129 (defendant did not act in reckless disregard of ADEA's legal requirements where its "officials met with their lawyers to determine whether the mandatory retirement policy violated the Act"); *see also* Vairo, *supra* note 13, at 351 (the fact that judges who have ruled on the merits of a pleading disagree provides significant evidence that the pleading was not frivolous or unreasonable).[14] The Ninth Circuit incorrectly operates under the opposite presumption.

In sum, the Ninth Circuit's interpretation of section 1681n(a) as applicable to conduct that the defendant does not

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[13] Similarly, in the context of Federal Rule of Civil Procedure 11, courts have repeatedly refused to find a legal argument frivolous or unreasonable where it concerns a matter of first impression. *See* Georgene M. Vairo, *Rule 11 Sanctions: Care Law, Perspectives and Preventative Measures* 340-46 (3d ed. 2004).

[14] Notably, in an earlier version of the opinion in *Reynolds*, the majority found that the defendants' interpretations of the statutory definition of adverse action were unreasonable and implausible as a matter of law and held that the defendants' "reliance on such implausible interpretations constitutes reckless disregard for the law and therefore amounts to a willful violation of the law." *Reynolds v. Hartford Fin. Servs. Group, Inc.*, 426 F.3d 1020, 1038 (9th Cir. 2005), *amended*, 435 F.3d 1081 (9th Cir. 2006). The majority declined to remand these cases to the district court for a finding on willfulness, noting that "[b]ecause the district judge has already ruled that the companies' positions on all of the principal issues were correct as a matter of law, she has also held, a fortiori, that the companies' reliance on these positions did not amount to reckless disregard for the law" and that it would be "futile[] to remand to the district court the questions whether the companies willfully failed to comply with FCRA." 426 F.3d at 1039 n.19. Judge Bybee dissented from this aspect of the majority's opinion, pointing out that the "district court *agreed* with [defendants'] legal position, a position the majority now declares to be 'nonsensical' and 'untenable.'" *Id.* at 1041 (Bybee, J., dissenting in part).

know to be unlawful is inconsistent with the language and purposes of the statute. Moreover, even if a recklessness standard were appropriate, the Ninth Circuit's directives on how a reckless standard would apply in the cases at bar warrant correction by this Court.

II. THIS COURT SHOULD CORRECT THE NINTH CIRCUIT'S ERRONEOUS INTERPRETATION OF THE FCRA'S DEFINITION OF "ADVERSE ACTION"

In its decisions below, the Ninth Circuit disregarded the ordinary and natural meanings of key terms in the statutory definition of "adverse action" in section 1681a(k)(1)(B)(i) of the FCRA, thereby expanding the notice obligations imposed upon insurance companies far beyond what the plain words of the statute authorize. In particular, the Ninth Circuit erred in ruling that the FCRA "requires [an adverse action] notice[] whenever a consumer pays a higher rate because his credit rating is less than the top potential score." *Reynolds*, 435 F.3d at 1093. The Ninth Circuit's holding erroneously expands the statute to cover factual circumstances in which (i) there is no credit information available for a consumer, (ii) the consumer obtains insurance rates that are better than those he would have had if his credit information had not been used, and (iii) the consumer is provided insurance at the rate previously quoted to him without use of his credit information. The Ninth Circuit's decision imposes a heavy burden on insurance companies making lawful use of credit information and is likely to result in a deluge of notices that will either confuse consumers or be ignored by them.

The "top potential" credit benchmark invented by the Ninth Circuit is found nowhere in the language of the statute. Use of that benchmark to determine whether there has been an increase in the rates charged for insurance within the meaning of the FCRA's definition of adverse action would lead to the untenable result, certainly unintended by Congress, that virtually every purchaser of insurance would be required to receive a FCRA notice. *See Clinton v. City of New York*, 524 U.S. 417, 429 (1998) (statutes should not be read to produce absurd and untenable results). The "ordinary

or natural" reading of "an increase in any charge" implies a simple and logical benchmark, *i.e.*, the price that was actually quoted or would have been quoted to the consumer without reference to credit information.

Significantly, Congress knows how to draft statutory language describing an action based on an unfavorable rate, even though there has been no "increase in any charge." Thus, in 2003, Congress enacted 15 U.S.C. § 1681m(h), as part of the Fair and Accurate Credit Transactions Act, Pub. L. No. 108-159, tit. III, § 311(a). Section 1681m(h)(1) requires notice when "any person uses a consumer report in connection with an application for, or a grant, extension, or other provision of, credit *on material terms that are materially less favorable than the most favorable terms available to a substantial proportion of consumers from or through that person*, based in whole or in part on a consumer report." 15 U.S.C. § 1681m(h)(1) (emphasis added). Section 1681m(h)(1) also demonstrates that, contrary to the Ninth Circuit, Congress has not made a policy determination to require notice to everyone who receives less than the most favorable terms, but only to those who receive terms less favorable than the most favorable terms available to a substantial proportion of consumers.

At the same time Congress added to the FCRA the definition of adverse action at issue in these cases, it amended the FCRA to make plain that insurance companies and credit companies may permissibly make offers to consumers prescreened on the basis of their credit information, without triggering notice obligations to consumers who do not receive the offer. *See* S. Rep. No. 104-185, at ~32-33 (1995) (discussing 15 U.S.C. § 1681b(c)(1)(B)(i) & 1681a(l);"failure to include a consumer in a prescreening solicitation does not constitute adverse action"). The same amendments also made clear that a company may use consumer reports to review the accounts of existing customers, and that there is no adverse action if a consumer's account is not changed, even if the accounts of other consumers are changed in a favorable manner. *See id.* (discussing 15 U.S.C. 1681a(m)). These amendments, which accompanied Congress's enactment of the definition of "adverse action" in the insurance context, are not compatible

with an interpretation of the definition of adverse action that is aimed at achieving the widest possible obligation to send adverse action notices.

The Ninth Circuit's erroneous rulings, if allowed to stand, will create vastly expanded, costly and burdensome notice obligations under the FCRA. These rulings should be reversed.

CONCLUSION

For all the foregoing reasons, *amicus curiae* respectfully submits that this Court should reverse the Ninth Circuit's decisions, both as to the Ninth Circuit's interpretation of the statutory term "willfully" in section 1681n(a) of the FCRA and as to its interpretation and application of the statutory definition of adverse action in section 1681a(k)(1)(B)(i) of the FCRA.

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